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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

AMANDA FRLEKIN and DEAN PELLE, on behalf of themselves and all others similarly situated, Plaintiff, VS. APPLE INC., a California corporation, Defendant.	**No. C 13-3451 WHA** San Francisco, California Wednesday, March 3, 2021

TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR

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(Appearances continued on next page)

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Wednesday - March 3, 2021 **8:07 a.m.**

P R O C E E D I N G S

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THE CLERK: This court is now in session, the Honorable William Alsup presiding.

Calling Civil matter 13-3451, Frlekin, et al., versus Apple Inc.

Starting with plaintiff, will counsel please state your appearances.

MR. SHALOV: Good morning, Your Honor. This is Lee Shalov, class counsel for the plaintiffs. With me are my colleagues Brett Gallaway and Jason Giaimo.

THE COURT: Good morning.

MR. DION-KINDEM: Good morning, Your Honor. Peter Dion-Kindem, also plaintiffs' counsel.

THE COURT: Good morning.

MS. KRALOWEC: Good morning, Your Honor. This is Kim Kralowec, also representing the plaintiffs. And with me on the line is my colleague, Kathleen Rogers.

THE COURT: Okay. Good morning.

MS. DUNN: Good morning, Your Honor. This is Julie Dunn on behalf of defendant Apple Inc.

THE COURT: Good morning.

MR. RILEY: Good morning, Your Honor. This is Matthew Riley appearing on behalf of Apple.

THE COURT: Good morning.

Anyone else?

Okay. You can see we've got a busy calendar today. And to kind of cut through all of this, I want to say I've read your materials, and I'm going to give you a chance to talk me out of this. So don't get too worried.

What I'm going to do is lay out a plan for going forward, having the benefit of what you've submitted, and then I'll let you try to modify it or say that it's a mistake or whatever. But I feel it will get to the heart of the issues a lot quicker if we do that. So get your pencil and paper and start making notes. I'm just going to lay out a plan of action. And the plan is as follows:

I would enter a partial judgment, in favor of the class and against Apple, stating that at all material times Apple was liable to compensate the class members for time spent standing in line and waiting to have their bags checked.

Number two, we will proceed with class notice and a claims process on an individual-by-individual basis. Each individual class member would submit a claim. And Apple would be given a reasonable opportunity to probe the accuracy of that.

I'm going to come in to give you more details on that in a moment, but I'm just giving you the big picture right now.

And then with respect to this issue of *de minimus*, it's not clear to me that this was preserved or how it was

preserved, but we don't have to decide that now. It will be up to Apple later to convince me that it was preserved.

I know it might not even apply under California law because *de minimus* is an FLSA concept, but if Apple can show me Supreme Court law in the California Supreme Court or something that is very close to it that *de minimus* applies under state law, then we will apply it in those instances where it's proven up.

The burden will be on Apple to show in any given case that it was *de minimus*.

Okay. So now I'm going to go into some of the details. Again, the first step would be to enter that partial judgment stating that Apple at all material times was liable to compensate the class members for time spent standing in line and getting their bags checked.

Now, with respect to the notice, I'll give you the big picture. I'm going to order a reasonable amount of notice and Apple to pay for it, but I'm not -- there's no way I'm going to order, at this point, all of the bone-crushing notice that the plaintiffs want. That conceivably could become important or required later, but I am convinced that the plan of notice that I have, I'm going to give you in just a moment, will work just fine.

So here's what we'll do:

Once we agree on the form of notice, Apple will send it by

first-class mail to each employee or former employee at the last known address.

Now, you've got to give the other side, meaning plaintiffs' counsel, exactly the names and exactly the addresses that you use so that there won't be any questions about where it was sent.

Now, in my experience, some of those will come back as undeliverable. And I have had tremendously good luck, better than you would think, using the National Change of Address registry, which is inexpensive and easy to use.

So let's say 20 percent comes back undelivered. We will get at least another 80 percent on the change of address registry. And so then Apple would send it again at Apple's expense.

Meanwhile, parallel email notices will go from Apple to the last known email addresses giving the same notice. So we're having notice by two means, first class mail and the email notice.

Now, on the letter that goes out it should have my name, my court address; in other words, showing it's coming from the U.S. District Court, because, otherwise, people might think it's junk mail.

And it shouldn't come from something like claims administrator. That goes straight into the trash can. It should have the court's name on it. And it could have

something saying "Important class action notice." That will be okay. But it's important that it go by first-class mail and by email.

In addition, there should be a website that -- I'm not sure how -- I'm going to leave it to the lawyers to figure out, but there should be a website where the claim form can -- and I'll come to the contents of the claim form in a minute -- where the claim form can be easily accessed by members.

By the way, I should say that the notice and the letter that goes out should have the simple one-page claim form in it so it can be sent in by mail. But it can also be done by website, and so that would be an alternative way for class members to check in to -- to put in their sworn claim form.

All right. I'm about halfway through, so don't panic.

I will not require further notice at this time because, in my experience, what I've outlined to you will be completely adequate. But if it's not, then we will have to consider some kind of supplement later on, and we'll cross that bridge if and when we need to.

Now, with respect to the amount of time to fill out the claim form and to give notice, 60 days might be enough, but I want to give class members more time, so I'm going to give them 120 days to -- from the date that we do the mailing to return the claim form.

And the reason for that is somebody who's going to do it

accurately needs to think about when they were employed by Apple and to try to think through the estimate that I'm going to require and to give an honest answer.

So I think saying 60 days, while it's conceivable, it's -- I'm sorry, is somebody interrupting me?

All right. Thank you.

Okay. The form of the notice, I'm not completely sure that I have all the problems with it, but let me give you some things that should definitely be there. There should be a new opportunity to opt out.

I know the prior had a prior opportunity and that it's not required to give a second opt-out, but I do think it's prudent to give them a second opportunity to opt out.

And, also, they have a duty -- not a duty, I'm sorry -- I have a duty to advise them of their right to intervene under Rule 23, which Rule 23 says the notice has got to tell them of their right to intervene.

So we should give them those notices. And the notice should further say that the Court -- I'll read this slowly. "The Court has found that Apple must pay its employees for time spent undergoing bag and technology searches."

And so that should be in there. In addition, it should say that class members -- depositions of class members may -- might be required. Might be required. And that they might be required to testify at a trial. That's only fair, because it

is true.

Okay. Now, I am getting close to the -- I'm about two-thirds of the way through.

Apple has to -- now, if Apple wants to use a claims administrator to send out these letters, that's okay, but you've got to pay for it. Apple's got to pay for it.

And the -- but if Apple does it itself, then we have to have a formal proof of service listing every single person and showing proper service. That's true for both the emails as well as the first-class mail.

Apple does not have to turn over social security numbers of its former employees. So I don't -- we're not going to invade -- put them at risk with social security numbers being divulged at this point.

Now, the claim form has got to be simple. One page. It's an old defense gimmick to make it so complicated no one will do it.

It'll be single page and it will require the name of the class member, the date the class member worked for Apple and at what location or locations, and estimate of the number of times the claimant had to have a bag checked. And that's an estimate, not a exact number. You could not expect them to have an exact number. And an estimated average length of time spent standing in a line and waiting to be searched, and so that would be the average length of time.

And my tentative plan at the end is to just multiply that number times the number of times, unless Apple has contrary proof, and award them that amount of money, multiplied times their salary at the time -- wages at the time. Now, the claim, it has to be under oath.

When all of the timely claim forms are received, Apple can then produce its own evidence, if it has any, to challenge the accuracy of any claim form.

For example, if Apple records show that the claimant did not work at Apple during the claim time, well, that would be a good point, and so it could submit proof to that effect.

Or let's say Apple has proof that the employee worked at a store -- different store than indicated, and at that store there was a locker room where there was never any need for a stand in line, so that would be good proof. I could imagine five or six other circumstances, but the burden would be on Apple to show all of that.

My hunch is that more than half of the claims would go uncontested and some smaller number would be contested, and that then we would turn to how we're going to deal with that.

If Apple makes enough of a showing to call into question the accuracy of the claim form, then Apple will be allowed a short deposition, probably by Zoom, to depose the plaintiff; in other words, to test the recollection of the claimant.

Likewise, plaintiffs' counsel -- plaintiffs' counsel will

be given opportunity to take short depositions to prove the accuracy of all of Apple's counterproof.

So, for example, let me imagine that Apple says, oh, wait a minute, at the store in Lone Pine, California, we had a locker room, and the locker room obviated the need for anyone to stand in line; and, therefore, nobody gets to recover from that store.

So plaintiffs' counsel could take a deposition to show that Apple is mistaken in that statement and that there's no basis for the statement and Apple itself is mistaken. So that would only be fair.

So after all -- all of the challenges are -- on both sides evidence has been challenged and so forth, if Apple still contests the accuracy of any of the claims, claim forms, we will hold a jury trial -- one or more jury trials to go over the contested claims.

And how those are going to be organized in the future depends on -- I can imagine, for example, one way to do it would be to say, okay, everyone who worked at the San Mateo store, we'll have one trial for them and, let's say, that store of people.

And the 12 people come in and testify, and Apple gets to cross-examine them. Then the jury goes and decides who's telling the truth; is it Apple or is it the employee? And then the jury renders a verdict claim by claim.

Then -- now, I want to turn finally -- I'm almost at the end. The *de minimus* defense. One step is to determine whether it even applies under California law. So that part we could probably get started on soon with some briefing on that issue. But a related issue is whether or not that issue has even been preserved by Apple.

Now, it's not necessary to put the *de minimus* defense as part of the summary judgment motion that Apple made before, because people all the time bring summary judgment motions on one issue instead of every issue in the case, and they think they can win on that one issue and, therefore, they don't need to bring up all the other backup points.

But it still has to be that the *de minimus* defense was preserved and placed in issue by Apple. And for the life of me I don't remember. I'm going to give you a chance in a minute to explain how and when you did preserve it.

But let's assume for the sake of argument that it was preserved and it is a defense. It will be easy. We will decide on what *de minimus* means. So let's say that it means -- I'm making this number up out of whole -- I'm not saying -- this is not a ruling.

I'm saying let's say it means X seconds. And so if the number of -- if we think that somebody at the XYZ store, that their line was typically less than X seconds standing in line, then the jury could take that into account in reducing a claim.

But I'm not going to require the claimants to list every single date that they stood in line and how long they stood in line. The reason I'm not is because too much time has passed and we can't expect them to remember those dates. No one could. If they did, they would not be telling the truth.

So Apple is just out of luck on that point and what will happen.

And I'm going to using aggregate numbers. But if the jury decides that within those aggregate numbers there was probably 25 percent that was *de minimus*, then the jury can deduct that from the ultimate award to that claimant.

All right. Now, that's -- that's a pretty good summary of how I think this case should proceed. And I've given it a lot of thought. So I'm going to start with the plaintiffs and let you try to talk me out of any of that or add or subtract from it.

So, plaintiffs, you get to go first, please.

MR. SHALOV: Good morning, Your Honor. This is Lee Shalov, class counsel for the plaintiffs. Thank you for that. I think this accomplishes much of what we had proposed, and we do appreciate the Court's consideration of this proposals.

A couple of items that Apple has agreed to.

In terms of additional notice, we would ask the Court to consider, in light of the fact that the names and addresses of the employees that we have are, for the most part, over five

and a half years old -- the Court may remember that when we disseminated notice, that was back in the fall of 2015. So I think it's safe to assume that a number of employees have moved since that time, particularly in light of COVID.

And so that to some extent we have stale addresses, and so direct notice and email notice might not be appropriate. So we think that the manner of notice that Apple has agreed to, including the publication notice, would be appropriate. So we'd ask the Court to consider, at least, that method of notice to capture people who have moved.

We'd also like to ask the Court to consider two other forms of notice that Apple has agreed to. One is a -- an initial postcard that we plan on sending to employees just to alert them to the fact that a notice is going to be forthcoming.

Our proposed claims administrator, Epic, suggests that that's a way to let class members be on the lookout for a detailed notice package, and might be helpful.

In addition, Apple has agreed to, and Epic also proposes, a reminder notice that we've found helpful in other cases where, after some period of time after the initial notice is sent out, another short reminder postcard notice is sent to members of the class to remind them of their ability to submit claims and the impending deadline to do that.

So we'd ask the Court to consider those additional forms

of notice, particularly in light of the fact that Apple has agreed to that.

THE COURT: Okay. So wait, wait. Can I interrupt you? I'll give you more time.

On the -- are you saying that Apple agreed that the notice would be published in some journal somewhere?

MR. SHALOV: Yes. We proposed six newspapers, Your Honor, in California that cover approximately 80 percent of the population, and proposed a publication notice in those newspapers.

THE COURT: Okay. And Apple's agreed to that?

MR. SHALOV: I'll let Apple respond, but I do believe in their papers they acknowledge that they would agree to those forms of publication.

THE COURT: And Apple agreed to pay for that?

MR. SHALOV: No, Apple has not agreed to pay for anything, Your Honor.

THE COURT: You're going to have to pay for it.

I don't think it's necessary, but I will allow it if you want to pay for the publication -- you, the plaintiff. So you're probably going to say no to that, but that's -- I don't think it's necessary.

MR. SHALOV: Your Honor, we'll defer to your guidance, clearly. I just want to let the Court know, as Your Honor probably already does, that in a circumstance where liability

has been established -- and based upon the Court's earlier observations, I believe that you will enter a judgment declaring Apple liable -- that the cost of notice shifts to the defendant pursuant to the Ninth Circuit's decision in the *Hunt* case.

THE COURT: I agree with all that, but that's only for notice that I think is reasonably necessary. Something that is icing on the cake, I don't think I should make Apple pay for that, at least at this point.

If it turns out that first-class mail is ineffective and the post office change of address is ineffective, then, yeah, publication. We might have to back up and give it another run with publication. But right now I don't think that's going to be necessary.

But if you wanted to pay for it, I would -- I would order it.

Now, let me ask Apple something. Did you agree to the postcard and to the reminder notice?

MS. DUNN: This is Julie Dunn, Your Honor.

Apple did agree in its opposition to the process that if the Court concluded that was appropriate, Apple would agree to it. But you're correct that that was all on the assumption that plaintiffs would be paying for notice.

Apple agrees with your proposed notice plan and agrees to pay for it, so -- the notice plan you outlined earlier in the

hearing.

THE COURT: Well, I'm going to -- I'm going to add to that the reminder notice at your expense but not the upfront postcard notice. So I like the idea of the reminder notice.

All right. That would just be for the people who have not responded but it had not come back undelivered. Let's say that that's probably going to be 5 to 10 percent, max, on the original group.

All right. Okay. Now, I interrupted the plaintiff. You were -- because you had more to say. And so I've now addressed the points you've made on notice so far, but please continue on.

MR. SHALOV: Thank you, Your Honor. Lee Shalov again.

Two other points, Your Honor. I just wanted to get the Court's guidance on our ability to communicate with class members regarding claims.

I'm sure the Court knows that we have been appointed as class counsel and that frequently in these types of cases class members will call with questions, they'll ask for information, they'll ask us, they'll ask the claims administrator.

And Apple appears to have taken the position that no form of communication is appropriate. We just think that's wrong, Your Honor, for a number of reasons.

THE COURT: Well, I agree with you. Wait, wait, wait. I agree with you. You're their lawyer right now.

Apple, what possible -- these people might need some guidance from their lawyer. And I think class counsel has every right to speak to his clients.

So what -- what does Apple think here?

MS. DUNN: Thank you, Your Honor. This is Julie Dunn speaking.

In our opposition, Your Honor, we did not object to class counsel or the administrator providing guidance regarding how the claim form was to be filled out.

The objection submitted, Your Honor, was to plaintiffs' proposal that class counsel and the claims administrator could contact class members and advise them as to how to respond to the form.

More specifically, they indicated they would look for, quote-unquote, outliers, people who reported too little time or people who reported too much time. They would contact them and encourage them to change their responses.

We thought that, Your Honor, was inappropriate and akin to this court's standing rule with respect to, for example, depositions, that an attorney cannot coach a witness regarding how to testify when providing testimony under oath. That was the limited purpose, Your Honor.

We point to Federal Rule of Civil Procedure 24(d)(1)(B). As the Court, I'm sure, knows, under that rule the Court can issue rules that require -- under (B), it says the Court may

require communications to protect class members and fairly conduct the action, giving appropriate notice to some or all of the class members of... and then it goes through.

So under the Court's authority, pursuant to Rule 23(d)(1)(C), we ask that the Court provide orders to ensure that the litigation is fairly conducted.

And we submit, Your Honor, that it would be inappropriate to contact class members and say, we'd like you to revise your sworn testimony because we think you are a, quote-unquote, outlier.

THE COURT: Well, how's this as a solution to that more limited problem?

I want to be clear that before anybody submits a claim, in my view, class counsel has a right to talk with their clients and explain how to fill out the form.

I realize that there's a theoretical risk of coaching and so forth, okay, but, nevertheless, they are the lawyers, and I'm going to presume that they honor their ethical obligations.

But once somebody has signed it under oath and submitted the form, then I don't want anybody contacting them to try to change it unless you get my prior approval.

So you'd have to make a motion at that time and explain why there's a need to talk to the -- to try to revise the sworn statement by the claimant.

So I think that's the way we're going to handle that piece

of it.

All right. Plaintiff, what's your next point that you have heartburn over?

MR. SHALOV: Yes. One final item, Your Honor. Thank you.

You had indicated that in the claim form employees would have to identify the dates they worked and the stores they worked at.

We had proposed, in light of the fact that Apple has this information, that Apple provide the information in a Excel database to the claims administrator so it could be auto populated in the claim forms.

That's something that's been done in other cases, particularly in a circumstance where employees have worked at stores eight, nine, ten years ago.

I think it would help make the process more effective and efficient if Apple provided us with that information and we included it already in the claim form to allow -- to avoid a situation where employees who forget that information don't have to think back many, many years to what took place.

THE COURT: You know, I like that idea. And I've used that in other cases.

It would be something like the notice, it's simple, that says, Dear Mr. X, our records show that you worked at the San Mateo store of Apple from June 3rd, 2012 to June 1, 2015.

And if this is incorrect, then please give the correct information.

Then go on to state what the -- give blanks to fill in as to the approximate number of times they stood in line and the estimate of how long each -- how long they stood in line each time.

So that would be -- I think I like that idea. But that turns on whether or not Apple actually has the data.

So let me ask Ms. Dunn, do you have the data, Ms. Dunn?

MS. DUNN: Yes, Your Honor. Apple does have that data.

And, sorry, for the court reporter, this is Julie Dunn speaking.

Your Honor, with respect to the claim form, if you'll take a look at Exhibit K to the Riley Declaration, I wanted to clarify that Apple's proposed claim form did not ask class members to report by dates they participated in checks.

Instead, kind of along the lines of what you were discussing, it asks the class members to identify the stores at which they worked and at which they participated in checks.

And then, for each of those stores, it asks them whether they participated in checks when leaving for meal periods and whether they participated in checks when leaving at the end of their shift.

So -- and then for those checks, just estimate the amount

of time in seconds or minutes.

THE COURT: Well, what -- all right. I missed that, but let me quiz you on it a minute. Why would it make a difference?

I don't like burdening the class members with more and more blanks to fill in, but if there's a very good reason for it, maybe we should do it.

So what is the reason for separating out end of the day versus lunchtime?

MS. DUNN: Your Honor, some employees may not have left for meal periods. Some employees may not have taken bags out at meal periods. Some people may have eaten on site. So that's why we're asking.

And, for that matter, some stores may have decided we don't do checks during the middle of the day, but at the end of the day or end of a shift they would. So to account for that, we just wanted to clarify, because it would matter in accumulation of total amount for the day and total amount for the week.

So let's say somebody says, yes, I participated in checks at that store and they lasted on average 30 seconds. We wouldn't know if that's 30 seconds each shift or 60 seconds each shift, because they did one at the meal period and they did one at the end of their shift.

THE COURT: Well, I'm still confused.

Let's -- I'll give you a hypothetical. Let's say that an employee answers the type of form that I was proposing and says, "I estimate that I stood in line 100 times," and, further, that they say, "I stood in line for 45 seconds each time."

So why does it matter whether they stood in line at lunch breaks versus end of the day? Were they --

MS. DUNN: Your Honor --

THE COURT: Were they compensated at the lunch break?

MS. DUNN: They were not, Your Honor. They were not. That is correct. We thought it would be -- yes.

Go ahead, Your Honor. I apologize.

THE COURT: I'm just trying to understand how it would affect the accuracy of our awards if some of it was lunchtime versus some of it was at the end of the day.

Why does it even matter?

MS. DUNN: I fully understand, Your Honor.

We thought it would be fairer to the class member so that they weren't confused and didn't think they could only report once. That's all we're saying.

We thought, for each store, if they could testify yes or no that they participated in checks at the meal period, yes or no at the end of the shrift, and for each of those checks they provided a time estimate. That's what we're saying, Your Honor.

If Your Honor thinks that one number puts the class member on sufficient notice, that when we say give us a total number of checks you participated in -- oh, by the way, Your Honor, the one problem with your proposal is, if they participated in a check when leaving for a rest break, that would have been paid. And I think you probably noted in plaintiffs' papers they included discussion of checks at rest breaks.

Those couldn't be at issue here in their complaint, as we noted in the opposition, makes clear it's checks occurring during unpaid periods of time, like when leaving for a meal period or leaving at the end of a shift.

So your proposal --

THE COURT: Well, the form -- those are good points.

The form -- claim form should make clear that it would not be for rest breaks, not to include rest breaks. Because, in other words, if that was already compensated then those fall away.

But is it remotely possible -- not remotely possible. Is it plausible that the length of a line was less at lunch time than less at the end of the day?

MS. DUNN: Absolutely, Your Honor. You can imagine all sorts of scenarios. But if you're in a small store and they stagger meal periods so that, you know, they have sufficient coverage, an employee may leave and encounter no line.

If they leave at the end of the shift, they might be leaving with other employees, and then that may result in more people having their bags checked at the same time.

So that's what we're accounting for in asking for different estimates for each type of check.

MR. SHALOV: May I respond, Your Honor?

THE COURT: Yes, please. Go ahead.

MR. SHALOV: I share Your Honor's observation that really, as a substantive matter, it doesn't make any difference at all whether somebody took -- endured a check during a meal period or at the end of a shift.

The reality is that a check is a check whenever it occurred, and that an employee should be compensated either for checks during meal periods or checks at the end of a shift.

And the reality is that, as a practical matter, requiring employees to try to remember seven, eight, nine, and even ten years ago when their checks occurred during the period of a day, when they probably went through hundreds, if not thousands of checks for some members of the class over an extended period of time, it's just not reasonable.

And so under the circumstances, particularly when, substantively, it doesn't make any difference at all, we don't think that delineating between meal periods and end-of-shift periods is the prudent way of taking care of this.

THE COURT: Well, I can imagine one scenario where it

would matter. Let's say that somebody said, I took a hundred breaks at lunch and a hundred breaks at the end -- not breaks, but -- that's the wrong term -- I had to stand in line 100 times at the end of the day and I had to go through the bag check 100 different times, but at lunchtime the line was always short and it was never more than 20 seconds.

And so let's say that we decide that 30 seconds is a *de minimus* cutoff. I'm not ruling that now, by the way. I'm just saying that hypothetically. Then all of those that were in the lunch line would be less than 30 seconds, or at least -- I don't -- there'd be an argument.

If we let them -- if we let them break it out now, Apple would -- if *de minimus* is, in fact, a defense, Apple will be entitled to ask at those depositions, okay, let's break down your gross number into lunch versus did you ever go out at lunch?

Answer: Yes.

Did you have to stand in line?

Well, not as often.

Would this be a way to facilitate getting to the heart of it quicker? Let me -- I want to hold that thought for a second.

Go ahead and tell me your next point. But it's not clear-cut to me what we should do there. Go ahead.

MR. SHALOV: Understood, Your Honor. Lee Shalov.

Perhaps I can make a recommendation, because I am concerned about potential confusion amongst plaintiffs members' inability to recollect.

Perhaps if we asked class members whether they can recall if there were different times, waiting times, associated with meal periods and then the shift periods, that they provide that information. But if they can't, then just to provide an aggregate number for both events; that is, meal periods and end-of-shift periods, so that we don't --

THE COURT: That's -- but that's asking them to -- you know, that has the problem of you have more lines to fill in.

Let me ask Apple a question.

At the end of the day everybody leaves, but did -- was there a break room or someplace on premises that employees could go for lunch?

MS. DUNN: Your Honor, there were various options at various stores. So, yes, some employees could choose to eat in the break room on site. Some stores had both an on-site break room and an off-site break room. Other employees might decide to leave and eat somewhere in the mall. So lots of options at meal periods.

And, by the way, Your Honor, some of those remote break rooms, the employees could leave their lunch in the remote break room, go to the store to work, come back without a check and eat lunch in the remote break room because they had no bag

to be checked.

So that's why we're trying to break down between meal periods and end of shift. They're different events with different facts and circumstances surrounding them.

In thinking forward to the discovery phase and the trial phase, it's not a burdensome amount of information we're asking for. It's just, for each store that they worked and for each year that they worked at the store, did they participate in checks at meal periods? Yes, no, sometimes.

And if it's yes or sometimes, what amount of times would they estimate. And we'd leave a blank and ask them to circle seconds or minutes.

If we prepopulate this, we can --

THE COURT: Why do we need to ask them year by year?

Let's say somebody worked three years. Why can't they just give an aggregate number? Even under your view, it would be broken out lunchtime searches and then how long that lasted, and then end-of-the-day searches, how long those lasted, and not require year by year.

MS. DUNN: Your Honor, I believe --

MR. SHALOV: Yeah, I think --

MS. DUNN: -- it's plaintiffs' suggestion that we prepopulate with the stores at which they worked. We could resolve that, because if we just say here are the stores at which you worked, then they can answer those questions.

We would just make clear on the claim form, this is a list of the stores at which you worked. If you worked there and participated in a check, please answer these questions. And then we wouldn't need to do the year by year.

THE COURT: Go ahead, plaintiff.

MR. SHALOV: Yeah. Your Honor, at this point we start getting concerned that we're undermining the Court's directive to have a simple and concise claim form where we're really just asking class members for information concerning the two salient questions, which are, you know, how many bag checks did you endure, how long did those checks take?

And so, now, in the circumstance where Apple is proposing that we separate it out by meal and shift periods, and then we start asking people to separate it out by years, we're sort of inconveniencing people, taxing their memories, and asking for unrealistic responses from class members and making this more difficult than it needs to be.

THE COURT: Look, I've got to move on here.

Here's what I want you to do. We're not going to break it out by year. Just an overall number. But I do think it should say expressly do not include rest period breaks.

But with respect to lunch breaks, how many times do you think you were searched and how long was the average for those? And then a second, for the end of the day, how many times were you searched and what was the average? That would be four

blanks to fill in. How many times, average duration for both of those two times.

Make clear in the intro that they should not include rest breaks. And then populate it with the information that is available from Apple as to the stores they worked at and when, but also give them the -- a blank to -- optional blank to correct that information in case their memory of it is different.

MR. DION-KINDEM: Your Honor, this is Peter Dion-Kindem. If I could make a suggestion in terms of prepopulating the claim form, in addition to the dates of employment, Apple has the data as to the number of shifts they worked.

So I think that would be helpful to tell the claimants that they worked X number of shifts. Then they can use that information to determine, you know, the number of meal breaks and the number of times. So I think -- and Apple has the information. Just giving them the dates of employment is not as helpful as the number of shifts, which Apple has.

Thank you.

THE COURT: What does Apple say to that?

MS. DUNN: Your Honor, it would obviously take much longer to pull that and to pull it accurately. I'd have to confer with my client to determine how burdensome it is to pull the number of shifts worked at each store.

THE COURT: I'm kind of leaning against that idea because I'm a little afraid that, by saying how many shifts they worked, that that will be too much of a suggestion to say, well, every single time -- you know, I worked 619 shifts, so every single time, and then -- and not try to actually think it through the number of times, if they, in fact, did have to go through the search. So I'm against that idea.

All right. I need to move on to the next case. I didn't give Apple --

Apple, do you have any heartburn over my proposal as amended?

MS. DUNN: Your Honor, the -- the one question we had was with respect to providing notice that class members may opt out.

It was our understanding that, at the class action notice juncture, that employees were given the opportunity at that time to opt out, and that if they did not, then they were bound by the proceedings as they went forward.

THE COURT: That is true. That is true. And it's discretionary with the district judge whether to give them another -- all right.

So you don't want them to opt out. You want them to be stuck in this case. Is that it?

MS. DUNN: Well, Your Honor, it would be cumbersome to -- we defer to Your Honor on that. If you want to include

an opt-out, we're perfectly fine with it.

THE COURT: If you both agree that you don't want an opt-out, I guess I'll go along with that.

But it's been so long, I somehow feel like if they do have to -- some people might say, "I don't want to go through that. I don't want my deposition taken. I'll just opt out." Or "I don't want to put something under oath," and so they just don't want to go through with it.

So I feel -- but if the plaintiff wants to delete the opt-out, I will, because it's not required the second time around.

Well, wait a minute. That's not right. Didn't you expand the class? I think you did.

MS. DUNN: Your Honor, this is Julie Dunn speaking.

The damages period was expanded from the date of August 10th, 2015, through December 17th, 2015.

THE COURT: All right.

MS. DUNN: But the composition, the members of the class, was not changed.

THE COURT: Even if there were other employees?

In other words, the first group of -- are you saying that anyone who was a member of the second little tagalong period, those names would be identical to the ones in the prior period who already got notice?

MS. DUNN: That is correct, Your Honor.

THE COURT: Okay. Well, if that's true -- but if there's even one additional person who has been -- who has been -- what's the word I'm looking for? -- folded into this class action, who wasn't in the first one, they have a right to opt out. And it would be wrong to -- it kind of surprises me that your employee group would be the same before and after that August date.

MS. KRALOWEC: Your Honor, this is Kim Kralowec for the plaintiffs.

The membership of the class has not changed. The parties stipulated to allow the existing class members to claim damages through the additional four months in December. But there has been no stipulation to change the membership in the class, so there are no new additional class members who did not previously receive an opportunity to opt out.

And I think that if someone decides that they -- you know, they don't want to be deposed, their solution is not to submit a claim form. I think the chances that someone who doesn't submit a claim form would be deposed in this case are probably nonexistent.

THE COURT: All right. Well, that's a fair point too.

What you say, though, I didn't realize, raises the specter that there are people from August to December of 2015 who are not in the class, but, nevertheless, were subject to the bag check, and that another lawyer out there is already writing the

class action complaint to cover that omitted group.

So that's what you lawyers want, so three. All right.

MS. KRALOWEC: Your Honor, this is Kim Kralowec again.

That is possible. And we urged Apple to stipulate to add any such additional persons to the existing class.

I tried very hard to persuade Apple that it should want to obtain complete peace for this bag check claim, but Apple did not want to add those additional persons to the class. It would have been an easy solution to stipulate to add them, but that's where we stand right now.

THE COURT: Okay. I'm not going to criticize either -- what you say is reasonable. And, actually, that's what I thought had happened, but now I stand corrected.

But I can -- you know, I'm just saying I can see within three months Apple will get sued in the tagalong case. Maybe the statute of limitations has run. I don't know. I don't know how that works.

Okay. All right. Leave out the opt-out. We don't need to complicate it. Just leave the second opt-out omitted. Omit that out. That was a mistaken idea on my part because I misunderstood where we were in the case.

Okay. Does Apple have any other heartburn issue?

(No response.)

THE COURT: Okay. Here's what I want the lawyers to please do. I want you to meet and confer and draft an order

that just sticks to the timeline and the plan going forward.

And, please, I didn't cover everything exactly, but what I want you to do is be reasonable and carry out the objectives here and submit that to me with the timeline in the form of an order. And it will have the form of the notice so that I can look at that one more time, and also the claim form.

And, again, I stress the claim form should be simple, one page, under oath, the information that I suggested earlier, and be prepopulated with -- so the example you give me should be an example of one that is prepopulated so that I can see how that's going to look to the recipient.

All right. So I want you to do that -- today is Thursday; right? How about by next Tuesday? Can you give me that? Or is that too soon?

Plaintiff first.

MR. SHALOV: For plaintiffs, Your Honor, Lee Shalov.

We'll undertake our best efforts to give it to you by Tuesday.

THE COURT: You've got to meet and confer.

MR. SHALOV: Yes.

THE COURT: Agree. Yeah. Okay.

MR. SHALOV: Understood.

THE COURT: All right. And how about that, Ms. Dunn?

MS. DUNN: Your Honor, two things. I was on mute when you asked if we had additional issues. And if I can just note

that we'd like to reserve our right to address these issues as they come up.

The first is that the Court indicated it would take the amount of time reported by class members and multiply it by the hourly rate. We just wanted to note this is a minimum wage claim, and so if it is nonovertime time, it would be multiplied by the minimum wage in effect.

Second, the Court indicated that it would conduct trials of all claims from particular stores. We'd like to address that once the claims process is done, because the practices in any given year may be different and we may get claimants from different years for different stores.

And then, lastly, Your Honor, you had not addressed motions ***in limine***, but we do want to make sure that there is time built in for Apple to submit its motions ***in limine***, some of which will apply classwide and some of which will be individualized.

THE COURT: Well, all right. On the latter point, in your timeline put in a final pretrial conference and then put in some deadlines for bringing motions ***in limine***. And if you're going to have experts, you've got to have a date for expert disclosures there.

That's -- but I don't think we're going to reopen fact discovery except with respect to the individual claims. Roll those dates in.

Now, with respect to your point about what will the trial look like, yeah, I'm leaving all of those issues open for future determination. It could be 14 trials. It could be one big trial.

I don't know yet how we're going to -- and by one big trial, I mean one where -- I can imagine this -- we have a jury, the jury goes and decides the first ten cases, comes back and renders a verdict. And then they continue on, same jury. We go to the next ten. They come back, render a verdict on the next ten.

You know, I know that's a little innovative, but I defy you to find any case law that says you can't do that. So there are many possibilities here so that we don't burden too many juries.

All of those -- the form and shape of the trial or trials is open for discussion down the road once we see how many claim forms are actually going to be contested.

Okay?

MS. DUNN: Thank you, Your Honor.

And if we could have until next Friday? I have some hearings in the interim.

THE COURT: Okay.

MS. DUNN: And so if we could have until next Friday to submit those documents, that would be appreciated.

THE COURT: All right. Friday at noon. Friday at

noon. All right.

MS. DUNN: Thank you, Your Honor.

THE COURT: Okay. Good luck to both sides. And someday we'll have this case behind us.

MR. SHALOV: Thank you, Your Honor.

THE COURT: Maybe I'll still be alive. Okay.

MR. SHALOV: Thank you.

MS. DUNN: Thank you, Your Honor.

THE COURT: You all hang up. Thank you.

(At 9:05 a.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Wednesday, March 3, 2021

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter